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No. 93-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

PETITIONERS' REPLY TO PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Petitioners George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and James R. Tilling, Secretary to the Apportioning Persons (collectively, "Petitioners"), petitioned this Court to issue a writ of mandamus. The Petition asked this Court to require the United States District Court for the Northern District of Ohio to comply with the mandate of this Court issued in the case of *Voinovich v. Quilter*, October Term, 1992, on March 2, 1993, and to confine its proceedings on remand to Plaintiffs-Respondents' "one person, one vote" claim as instructed in this Court's opinion. On May 23, 1994, Plaintiffs-Respondents filed a Brief in Opposition to that Petition in which they attempted to characterize the Petition merely as an attempt to interfere with the District Court's discretion in granting a motion to amend the pleadings. Because this is a complete mischaracterization of the relief requested, Petitioners file this short reply.

REASONS FOR GRANTING THE WRIT

THE DISTRICT COURT, TO THE SUBSTANTIAL PREJUDICE OF PETITIONERS, EXCEEDED THE SCOPE OF THIS COURT'S REMAND IN *VOINOVICH v. QUILTER*, 113 S.CT. 1149 (1993), AND PETITIONERS ARE, THEREFORE, ENTITLED TO A WRIT OF MANDAMUS.

1. In their Brief in Opposition, Respondents acknowledge that they did not raise a Fourteenth Amendment racial gerrymandering claim in the District Court until well after this Court's decision in this case, see Brief in Opposition at 4, and that all of the issues they did raise have now been resolved in favor of the Petitioners, see Brief in Opposition at 4-5. Respondents have, in effect, conceded that *this case* is over. Petitioners have simply asked this Court to declare just that.

2. Respondents also suggest that the Petitioners have asked this Court to declare that "Ohio's reapportionment scheme, alone among the fifty states, was to be exempt from the close scrutiny of race-based redistricting plans under the Fourteenth Amendment . . . ." Brief in Opposition at 5. Petitioners, however, have not requested any such relief. Rather, Petitioners have simply asked this Court to enforce its mandate issued in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), to prohibit *these Plaintiffs, in this case,* from beginning anew their attack on the Ohio reapportionment plan.

3. In their Brief in Opposition, Respondents echoed the District Court's sentiments that it would be "unfair" to foreclose the lower court's consideration of their claim under *Shaw v. Reno,* 113 S.Ct. 2816 (1993), when that case was not decided until after this Court had issued its decision in this case. See Brief in Opposition at 13. It must be remembered, however, that the claim of race-based gerrymandering in violation of the Fourteenth Amendment was not new to the Respondents when this Court

issued its decision in *Shaw*. Indeed, the Respondents asserted such a claim in *December, 1991*, in the brief they filed with the Ohio Supreme Court in the case of *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). See Petition at 36a-38a. For whatever reason, they consciously chose not to assert such a claim *in this case* until after this Court issued its decision reversing the District Court's decision on all of their other claims.[1]

Furthermore, as noted above, this Court's issuance of a writ of mandamus ordering the District Court to comply with the mandate in *Voinovich v. Quilter, supra*, would not, as suggested by Respondents, completely foreclose a district court's future consideration of a properly asserted *Shaw*-like claim. It would simply prohibit *these Plaintiffs* from prolonging *this litigation* in contravention of this Court's mandate.

4. Respondents have disputed the applicability of a number of the cases cited by Petitioners. Because Petitioners can discern no value in further discussing the interpretation of these decisions, Petitioners rest upon the discussion of these cases contained in the Petition.

Significantly, however, the Respondents did not even cite this Court's decision in *United States v. Haley*, 371 U.S. 18 (1962), the case most analogous to the issue presented by the Petition herein. The Court in *Haley*, like the Court in *Voinovich v. Quilter*, reversed the district court, leaving only one issue for the district court's consideration on remand. The district court, however, went beyond the scope of the Court's remand and adjudicated other issues. On consideration of a motion for leave to file a petition for a writ of mandamus, this Court in *Haley* concluded that "[t]he District Court's error should be rectified without delay, and we think that

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[1] Under Respondents' logic, the issues in *Shaw* would have never been presented to this Court because no plaintiff could be expected to assert a novel claim unless and until this Court has issued a decision in which it stated that such a claim exists.

the proper means for accomplishing this is by mandamus." 371 U.S. at 20 (citations omitted).[2]

5. Respondents argue that the Petitioners' request for the issuance of a writ of mandamus is based solely upon this Court's use of the word "only" in the first part of its opinion in *Voinovich v. Quilter*. Although the Petitioners do rely upon this Court's use of the word "only," the scope of the Petition is clearly broader.

Petitioners submit that this Court's use of the word "only" in its opinion, at the close of a detailed overview of the comprehensive litigation concerning the validity of the Ohio reapportionment plan, was not inadvertent. The Court, being fully aware of the history of this case as well as the issues raised in *Shaw* at the time it issued its unanimous decision in this case, deliberately inserted the word to ensure that *this challenge* to the Ohio reapportionment plan would come to a close. The District Court's decision at issue herein has totally eviscerated this Court's use of the word.

6. Finally, Respondents argue that Petitioners have failed to establish the prerequisites to this Court's issuance of a writ of mandamus. Specifically Respondents assert that Petitioners' claim of "hardship" does not rise to the level of "extraordinary circumstances" warranting the issuance of the writ. This Court, however, has on numerous occasions stressed that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993) (citation omitted). See also *Voinovich*, 113 S.Ct. at 1156-57. The decision of the District Court at issue herein is, in effect, an extension of the lower court's retention of jurisdiction as some sort of "super apportionment board" to rule on

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[2] Nor do Respondents cite *Gaines v. Caldwell*, 148 U.S. 228 (1893), in which the Court concluded that its mandate was enforceable through the issuance of a writ of mandamus, and that its mandate was not affected by its subsequent decisions. 148 U.S. at 238, 244.

all aspects of the Ohio reapportionment. This is precisely the type of federal court interference this Court cautioned against in *Growe*.

Not only have Defendants [Petitioners here] been prejudiced by this interference, but 292 candidates who filed petitions to run for seats in the General Assembly prior to the February 17, 1994, deadline, and all the voters of Ohio have been prejudiced by once again leaving in doubt the validity of the plan of apportionment for the General Assembly. Surely, the prolonged continuation of the cloud hanging over Ohio's reapportionment plan constitutes the "extraordinary" circumstances which require this Court to enforce its mandate in *Voinovich v. Quilter, supra.*

CONCLUSION

For the reasons stated, Petitioners respectfully request this Court to issue a writ of mandamus to the Judges-Respondents directing them to vacate their Opinion and Order of March 31, 1994, granting Planitiffs' motion to file a second amended complaint and to confine their proceedings on remand to the Plaintiffs-Respondents' "one person, one vote" claim is instructed in this Court's opinion in *Voinovich v. Quilter,* 113 S.Ct. 1149 (1993). Because the District Court has now resolved that claim in favor of the Defendants-Petitioners, this Court should further direct the District Court to enter judgment in favor of the Defendants-Petitioners.

Respectfully submitted,

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